

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOTHARIO DEWITT TRIPLETT,

Defendant-Appellant.

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UNPUBLISHED

June 26, 2014

No. 315049

Wayne Circuit Court

LC No. 12-009212-FH

Before: SAWYER, P.J., AND METER AND FORT HOOD, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during commission (felony-firearm), second offense, 750.227b.<sup>1</sup> The court sentenced defendant as a fourth time habitual offender, MCL 769.12, to incarceration for 3.5 to 20 years for felon in possession, to be served consecutively with his five-year sentence for felony-firearm, second offense. We affirm.

Sergeant Robert Avery testified that, while performing neighborhood surveillance, he observed defendant in possession of a handgun while moving away from a suspected drug house. He contacted other police officers to investigate defendant when he returned. Officer Joseph Dabliz responded. When he heard someone running inside the home, which made him think that someone was either hiding evidence or fleeing out the backdoor of the home, Dabliz went to the rear end of the house. While looking through a rear window, he observed defendant remove a pistol from his pants and conceal it inside a closet. The police retrieved three handguns from the home, including the pistol from the closet. Defendant gave a statement to police that was the subject of a pretrial suppression motion, which the court denied.

Defendant first asserts that his confession was inadmissible because it was an involuntary fruit of police coercion.

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<sup>1</sup> The court entered a directed verdict in defendant's favor on the charge of carrying a concealed weapon, MCL 750.227.

This Court reviews de novo the question of voluntariness [of a confession]. Deference is given, however, to the trial court's assessment of the credibility of the witnesses and the weight accorded to the evidence. The trial court's factual findings are subject to reversal only if clearly erroneous, meaning that this Court is left with a firm and definite conviction that a mistake has been made. [*People v Ryan*, 295 Mich App 388, 396; 819 NW2d 55 (2012) (citations and internal quotation marks omitted).]

Involuntary confessions are inadmissible because they violate a person's constitutional right to be free from compelled self-incrimination. US Const, Am V. Our Supreme Court established the following analysis to determine whether a confession was voluntarily given, or whether it was the product of improper police coercion:

The test of voluntariness should be whether, considering the totality of all the surrounding circumstances, the confession is "the product of an essentially free and unconstrained choice by its maker," or whether the accused's "will has been overborne and his capacity for self-determination critically impaired . . . ." The line of demarcation "is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."

In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [*People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988) (citations omitted; textual omission by *Cipriano* Court).]

Regarding promises of leniency towards a defendant, our Supreme Court held that confessions may be admissible or inadmissible depending on the circumstances:

[A] statement induced by a law enforcement official's promise of leniency is involuntary and inadmissible, if there was a promise of leniency and that promise caused the defendant to confess. In determining whether a promise of leniency exists, the relevant inquiry is whether the defendant reasonably understood the

official's statements to be a promise of leniency. In determining whether that promise caused the defendant to confess, we will ask whether the promise was one relied upon by the defendant in making his decision to offer inculpatory statements, and whether it was one that prompted him in fact to give those statements. If the answer to all of the foregoing inquiries is affirmative, the defendant's statements are involuntary and inadmissible. If the answer to any of the questions is negative, the defendant's statements are admissible. [*People v Conte*, 421 Mich 704, 712; 365 NW2d 648 (1984).]

Sergeant Robert Turner, the officer who took defendant's confession, stated that he notified defendant of his constitutional rights before interrogating him and taking his statement at the precinct on the day after his arrest. Turner asserted that defendant read and initialed the "Certificate of Notification for Constitutional Rights" form. Turner stated that defendant appeared to be reading the document when he initialed each sentence. He also stated that he verbally recited those rights to defendant prior to the interrogation. According to Turner, defendant agreed to answer his questions. Turner indicated that defendant was cooperative and did not appear to be intoxicated. He denied threatening defendant or denying him access to food and water. Turner acknowledged that defendant mentioned, near the end of the interview, that he had an old gunshot wound to his gut. Turner denied, however, that defendant requested medical treatment, medication, or water during the interrogation, or that he noticed a hospital band on defendant's wrist. He claimed that the interrogation lasted between 20 and 25 minutes and that defendant never asked for a break. Nor did defendant ask for an attorney at any point. He said that defendant never attempted to terminate the interrogation prior to its completion. Turner acknowledged telling defendant that "it would be in [defendant's] best interest to tell the truth," and indicated that he may have told defendant that "things would be better" for him if he cooperated. But he denied telling defendant that things would go bad for him if he did not make a statement. And he asserted that he told defendant that he had no control over the judge's ultimate decision in the case, implicitly denying that he could guarantee leniency to defendant if he cooperated.

Defendant testified that he was unsure of how much sleep he received on the night before the interrogation. He claimed that he took two Xanax pills prior to the interrogation, but denied that they interfered with his memory of the interrogation. Defendant claimed that he told Turner that he had a limp and suffered pain stemming from an old gunshot wound to his gut. Defendant also claimed that the police "threw" him around during the arrest at his home, which aggravated his old gunshot injury. But he denied that Turner did anything to cause him physical pain on that day. He claimed that he asked for water during the interview, but that Turner did not provide it to him. Defendant said that Turner promised to let him go if he gave a statement to the police. He also claimed that Turner threatened to lock him up if he did not cooperate with the interrogation and left defendant alone in the interrogation room several times, which intensified his fear. But defendant said that he gave a statement because his girlfriend was defenseless in an unlocked home, implying that he needed to protect her because of threats made against his life. Defendant could not recall whether Turner spoke with him about his legal rights, but acknowledged that his initials were on the document informing him of his legal rights. Defendant claimed, however, that Turner promised to release him if he signed the document. Further, defendant acknowledged that the handwriting on the document was his own, but asserted that he sometimes signs documents without reading them when he is scared. When

asked to read the document during the hearing, defendant said that he could not do it because he had poor eyesight.

The trial court did not err in denying defendant's motion to suppress the confession because defendant's confession was voluntary. Deferring to the court's credibility determinations, the record established that defendant read and initialed the consent form, that he was only briefly interviewed, that he was not denied access to water, and that he did not notify Turner of any pain he was experiencing until near the end of the interview. It is not the fact alone that he may have been in pain that is important to consider. The question is whether the police were aware of the pain and then proceeded with the interview, thus placing defendant in a situation where his choice to make a statement was impacted by the discomfort he was in. The court also found that the officer's general assurances that "things will go better" if defendant cooperated were not specific enough to render the confession involuntary. Although Turner admitted that he may have said this, he clarified it by stating that it would be beneficial to defendant's case if he told the truth. Turner also testified that he informed defendant that he could not affect the judge's ultimate decision in his case. In so doing, he implicitly notified defendant that he could not achieve leniency for defendant. Based on Turner's disclosure, defendant had no reasonable basis to believe that this statement was an offer of leniency.

Defendant also argues that the prosecutor's closing comments crossed the line into prosecutorial misconduct, and that his counsel provided constitutionally deficient legal assistance by failing to object. Defendant preserved through timely objection his challenge to plaintiff's statements attacking defendant's credibility. See *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010). But he did not preserve his challenges to plaintiff's statements that purportedly bolstered improperly the credibility of its witnesses.

A claim of ineffective assistance of counsel is preserved by timely moving for a new trial, or by moving for a *Ginther* hearing.<sup>2</sup> *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Defendant did not move for a new trial or for a *Ginther* hearing, so the issue is unpreserved. Where a defendant raises an unpreserved claim of prosecutorial misconduct, the defendant bears the burden of showing that the error was plain and affected his substantial rights, which occurs when the error "resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *People v Abraham*, 256 Mich App 265, 274-275; 662 NW2d 836 (2003). Because one of defendant's challenges is preserved and the other is unpreserved, the preserved issue will be reviewed de novo while the unpreserved one will be reviewed for plain error.

Under plain error review, reversal is not warranted unless: (1) the error occurred; (2) the error was plain, or obvious; and (3) the error affected the party's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). After such a showing, reversal is warranted only when "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial

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<sup>2</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

proceedings independent of the defendant's innocence." *Id.* at 763-764 (internal quotation marks and citations omitted).

Regarding ineffective assistance of counsel:

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. Where claims of ineffective assistance of counsel have not been preserved, our review is limited to errors apparent on the record. . . . [*People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004) (internal quotation marks and citations omitted).]

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted). Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. . . ." *Abraham*, 256 Mich App at 272-273 (citation omitted).

Generally, prosecutors should restrict their comments to matters relevant to proving a defendant's guilt or innocence. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Commenting on witness credibility is inappropriate when it implies that the police, judge, or prosecutor has special knowledge of the case. *People v Thomas*, 260 Mich App 450, 453-455; 678 NW2d 631 (2004). And bolstering one's own witnesses during closing arguments is entirely appropriate "when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Id.* at 455.

During closing arguments, the prosecutor made the following statements:

[Avery] radios his unit for help immediately. They come to the area. According to Sergeant Avery, it only takes them about 30 seconds before he can take off and leave because he's in his undercover capacity. So, again, there is no mystery suspect and there is no mysterious crime. Police are just doing their job in this particular case. They know what they're looking for, they know what they're doing. They do this a lot.

. . . Officer Connor goes to the side of the house, knowing that they need to cover all areas of the house. Because, again, they are experienced police officers. They know what they're doing. They know what they're looking for.

The prosecutor later commented on defendant's credibility as follows:

There is a stipulation between defense counsel and I that [defendant] has a prior record. Nobody disputes this. It is clear and it is understood by everybody in this case that this man cannot and should not and must not have a weapon. Yet,

in this case, that's exactly what he's doing. He has a weapon. He knows that he shouldn't have it. He does what he can to try and hide it.

Now take the time to reflect on some of [defendant's] testimony himself as well as that of his girlfriend. They describe a somewhat different situation which is not to be—which is not unexpected, considering a person who is being charged with a crime. He is going to do whatever he can to get out of it.

After the court overruled defendant's objection, the prosecutor continued: "He is going to try to find a way to stay out of trouble, and he's going to enlist the help of his friends and family, in this case, his girlfriend, to try and help him dig out of a hole that he has put himself into."

Defendant is not entitled to a new trial because the prosecution did not engage in prosecutorial misconduct. Plaintiff's comments about the police officers knowing what they are doing did not actually bolster their credibility. When considered in context, these statements merely explained why the officers executed the investigation and arrest in the manner chosen. They were not offered, and in no way implied, that the officers would only have been at defendant's home if he was guilty. And even if this evidence somehow could have bolstered their credibility, plaintiff was entirely permitted to bolster the credibility of the officers because defendant and his girlfriend presented accounts of the arrest that significantly diverged from the accounts given by the police officers. Moreover, none of the prosecution's statements implied that the state possessed special, inside knowledge that made the officers more credible than defendant.

And because defendant's account of the arrest differed so greatly from the statements of the arresting officers, plaintiff was fully permitted to impeach defendant's credibility during the trial. MRE 608. The prosecution has wide latitude to "argue the evidence and all reasonable inferences arising from it as they relate to [the] theory of the case." *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). The record established that defendant attempted to conceal his criminal actions by hiding his firearm in the closet before his arrest. When his divergent account is considered in light of his prior concealment, it is reasonable to infer that defendant could have fabricated his testimony in order to escape punishment, and that he could have manipulated his girlfriend into fabricating her testimony for that reason.

Further, defendant's counsel did not provide him ineffective assistance of trial counsel. Defendant bears a high burden in proving that his trial counsel was so deficient as to functionally deprive defendant of his Sixth Amendment right to effective counsel. *People v Meissner*, 294 Mich App 438, 458-459; 812 NW2d 37 (2011). The United States Supreme Court has set forth a two-prong test to determine whether counsel was ineffective in a given case. First, defendant must prove that his trial counsel failed to meet an objective standard of reasonableness based on "prevailing professional norms." *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See also *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). Second, defendant must establish prejudice, which is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. See also *Armstrong*, 490 Mich at 290.

Defense counsel timely objected to plaintiff's comments attacking defendant's credibility, so that cannot provide a basis for proving ineffective legal assistance. And because the prosecution did not engage in prosecutorial misconduct by editorializing on why the officers executed their investigation as stated, defendant's trial counsel did not provide ineffective legal assistance by failing to raise a meritless objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998) (counsel cannot be deemed ineffective for failing to raise a meritless objection).

Affirmed.

/s/ David H. Sawyer  
/s/ Patrick M. Meter  
/s/ Karen M. Fort Hood